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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Marisela Velasco,

10 Plaintiff,

11 v.

12 Bodega Latina Corporation, et al.,

13 Defendants.
14

No. CV-18-02340-PHX-ROS

ORDER

15 Plaintiff Marisela Velasco slipped and fell while shopping at a grocery store owned
16 by Defendant Bodega Latina Corporation. Plaintiff believes Defendant was negligent in
17 allowing a puddle of water to be on the floor. Defendant now seeks summary judgment by
18 arguing it did not have actual or constructive notice of the water. Plaintiff responds that
19 there is a dispute of fact whether Defendants “did enough” in monitoring the condition of
20 the store. (Doc. 37 at 6). Plaintiff has not, however, pointed to evidence in support of her
21 various theories of liability. Therefore, Defendant’s motion for summary judgment will be
22 granted.

23 **FACTUAL BACKGROUND**

24 Most of the relevant facts are undisputed but where there are disputes, the following
25 presents the facts in the light most favorable to Plaintiff. On May 20, 2016, Plaintiff was
26 grocery shopping at Defendant’s store. While walking through the store, Plaintiff slipped
27 and fell on a puddle of water in the store’s produce section. The incident was captured on
28 surveillance video.

1 The surveillance video depicts two aisles, with bins of produce between them. At
2 2:15 p.m., the video shows two women pushing a shopping cart down the left-hand aisle.
3 There is a young child seated in the shopping cart. The cart stops next to a produce bin
4 and one of the women begins to select produce. The other woman is looking at her phone.
5 While stopped, the young child reaches down into the cart and picks up what appears to be
6 a container of liquid. The child seems to drink from the container and, at 2:18:35 p.m.,
7 tries to put the container back in the cart but the container tips over. The video does not
8 show liquid spilling out but the woman who was looking at her phone quickly straightens
9 the container and then throws up her hands, as if in frustration. Neither woman attempts
10 to clean up a spill nor does either woman alert an employee. At 2:18:59 p.m., the women
11 and child continue down the aisle.

12 The video shows a few other customers walking in the area where the women and
13 child had been. It does not appear that anyone notices water on the floor. At 2:20:00 p.m.,
14 one of Defendant's employees appears in the video. That employee walks down the right-
15 hand aisle. While walking down the aisle, the employee is often looking to her left, away
16 from the area of the puddle. When almost parallel with the puddle in the left-hand aisle,
17 the employee turns and continues down a perpendicular aisle. The employee does not go
18 into the left-hand aisle and there is no indication from all the evidence offered that the
19 employee could have seen the puddle from her position in the right-hand aisle.¹ At 2:22:09
20 p.m., Plaintiff can be seen walking down the left-hand aisle. At 2:22:31, Plaintiff slips on
21 a puddle of water and falls to the ground, suffering injuries.

22 In its summary judgment briefing, Defendant argues the puddle of water on which
23 Plaintiff slipped originated from the child in the shopping cart. If that is accurate, the water
24 was on the floor for slightly less than four minutes. Plaintiff disagrees that the puddle of

25 ¹ That employee died sometime after these events and before Plaintiff could question her.
26 The video also shows an employee of a separate business located in Defendant's store
27 walks by the location of the puddle. That individual, however, has no formal relationship
28 with Defendant. As described by Defendant's store manager, the individual worked for
"Moneygram," a business that rented space in Defendant's store. Moneygram is
"completely separate from [Defendant's] store." (Doc. 35-5 at 50). Plaintiff has not
pointed to any facts establishing this individual should be deemed Defendant's employee
or agent.

1 water originated from the child. Instead, Plaintiff appears to believe the water was on the
2 floor for a longer period. Plaintiff, however, has not offered any evidence supporting an
3 alternative source for the water.

4 On the day of Plaintiff's fall, Defendant had two employees patrolling the store
5 looking for spills or other hazards. As described by the store manager, Defendant "always
6 has two employees on duty, referred to as 'runners,' whose only job was to '[s]weep and
7 just look for any -- anything that can cause an incident on the floor for our employees or
8 customers.'" (Doc. 35 at 2). Usually one of those runners was assigned to the produce
9 section, the section where Plaintiff fell. (Doc. 35-5 at 53). Defendant required its runners
10 to sign "sweep sheets" every thirty minutes indicating they checked the areas they were
11 responsible for. The sweep sheets for the date of Plaintiff's fall indicate the produce area
12 was checked and cleaned at 2:00 p.m., approximately twenty-two minutes before Plaintiff's
13 fall. (Doc. 35-6).

14 In June 2017, Plaintiff filed suit in Maricopa County Superior Court alleging
15 Defendant had maintained its store in an "unreasonably dangerous condition" by allowing
16 a puddle of water to be on the floor. (Doc. 1-2 at 4). Defendant answered the complaint
17 and the parties proceeded with litigation in state court. In July 2018, Defendant removed
18 the case to federal court. The Court informed Plaintiff she could obtain remand if she
19 objected based on the timeliness of the removal. Plaintiff chose not to object on that basis
20 and the case remained in federal court.

21 ANALYSIS

22 I. Federal Summary Judgment Law Applies

23 Defendant seeks summary judgment on Plaintiff's sole claim for negligence.
24 Because this case is in federal court based on diversity jurisdiction, "the procedural aspects
25 of summary judgment are governed by the Federal Rules of Civil Procedure, and the law
26 of the forum controls the substantive issues." *Cuprite Mine Partners LLC v. Anderson*,
27 809 F.3d 548, 554 (9th Cir. 2015). Thus, contrary to Plaintiff's arguments that Arizona's
28 law regarding summary judgment should apply, the Court must apply federal summary

1 judgment law while still applying Arizona substantive law.

2 Under federal summary judgment law, Defendant has the initial burden of
3 producing “evidence negating an essential element” of Plaintiff’s claim or “show[ing] that
4 [Plaintiff] does not have enough evidence of an essential element to carry its ultimate
5 burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*,
6 210 F.3d 1099, 1102 (9th Cir. 2000). If Defendant carries that initial burden, the burden
7 shifts to Plaintiff to produce at least “enough evidence to create a genuine issue of material
8 fact.” *Id.* at 1103. Such evidence must be more than “[a] scintilla,” more than “merely
9 colorable,” and cannot rest on speculation. *United Steelworkers of Am. v. Phelps Dodge*
10 *Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989); *United States Postal Serv. v. Ester*, 836 F.3d
11 1189, 1198 (9th Cir. 2016) (speculation not enough to defeat summary judgment). If all
12 Plaintiff offers is speculation about what might have happened, the Court must grant
13 summary judgment in favor of Defendant. *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075,
14 1081–82 (9th Cir. 1996) (“[M]ere allegation and speculation do not create a factual dispute
15 for purposes of summary judgment.”).

16 **II. Arizona Premises Liability Law**

17 Under Arizona law, Defendant had “an affirmative duty to make and keep [its]
18 premises reasonably safe for customers.” *Chiara v. Fry’s Food Stores of Arizona, Inc.*,
19 733 P.2d 283, 284 (Ariz. 1987). But Defendant was “not an insurer of [its customers’]
20 safety and [was] not required to keep the premises absolutely safe.” *Preuss v. Sambo’s of*
21 *Arizona, Inc.*, 635 P.2d 1210, 1211 (Ariz. 1981). Thus, “the mere occurrence of a fall on
22 [Defendant’s] premises is insufficient to prove negligence.” *Id.*

23 Arizona has adopted four ways a customer might impose liability on a store for a
24 slip-and-fall. The first three options are straightforward, but quite difficult for an injured
25 person to prove. Those options require a plaintiff prove 1) the dangerous condition was
26 the result of the store’s acts or the acts of its employees, or 2) the store had actual
27 knowledge or notice of the dangerous condition, or 3) the dangerous condition was present
28 “for such a length of time that in the exercise of ordinary care [the store] should have known

1 of it and taken action to remedy it (i.e., constructive notice).” *Walker v. Montgomery Ward*
2 & Co., 511 P.2d 699, 702 (Ariz. Ct. App. 1973).

3 Long ago, the Arizona Supreme Court recognized these first three options create
4 “substantial hurdles” for a plaintiff because a plaintiff “will rarely be able to trace the
5 origins of the accident.” *Chiara*, 733 P.2d at 285. That is, a plaintiff will often have no
6 way of knowing what caused the dangerous condition, whether a defendant had actual
7 knowledge of the condition, or whether the dangerous condition had existed for long
8 enough such that the store should have known of it. *Id.* To lessen the “seeming inequity”
9 of requiring a plaintiff prove such difficult matters, Arizona has adopted a fourth option
10 known as the “mode-of-operation rule.” *Id.*

11 Pursuant to the mode-of-operation rule, a plaintiff need not prove the store had
12 actual or constructive notice of the dangerous condition. Instead, a plaintiff can prove the
13 store was operated in such a manner that the store should have “reasonably anticipate[d]
14 hazardous conditions would regularly arise.” *Id.* Once a plaintiff establishes that, she must
15 also prove the store “failed to exercise due care to prevent harm under the[] circumstances.”
16 *McKillip v. Smitty’s Super Valu, Inc.*, 945 P.2d 372, 375 (Ariz. Ct. App. 1997).

17 The parties’ summary judgment papers present arguments regarding all four of the
18 options. According to Defendant, Plaintiff does not have any evidence showing the water
19 was the result of Defendant’s actions nor does she have evidence of actual or constructive
20 notice. Defendant also argues the mode-of-operation rule does not apply but, even if it did,
21 Plaintiff does not have evidence supporting that rule. Plaintiff disagrees, but only regarding
22 some of the options.

23 **A. Defendant’s Own Actions and Actual Notice**

24 Plaintiff concedes she has no evidence the water was on the floor as a result of
25 Defendant’s own actions. Plaintiff also concedes she has no evidence that Defendant had
26 actual notice the water was on the floor. Thus, Defendant is entitled to summary judgment
27 regarding the first two options.²

28 ² Plaintiff’s opposition to the motion for summary judgment states “The three ways in
which a party can establish notice of a dangerous condition are simply as follows: 1) actual

1 **B. Constructive Notice**

2 Defendant argues Plaintiff does not have sufficient evidence to proceed to trial on
3 her constructive notice theory. Under Arizona law, Defendant had constructive notice of
4 the water only if the water was on the floor for long enough that Defendant should have
5 learned of it and taken steps to remedy it. *Walker v. Montgomery Ward & Co.*, 511 P.2d
6 699, 702 (Ariz. Ct. App. 1973). Plaintiff disagrees with Defendant regarding the length of
7 time the water was on the floor but Plaintiff seems to misunderstand her burden under the
8 constructive notice approach.³

9 To prevail on her constructive notice theory at trial, Plaintiff would have to establish
10 two facts: 1) the amount of time the water was on the floor; and 2) that amount of time was
11 not reasonable given the circumstances. As explained by the Arizona Court of Appeals,
12 the first fact involving the amount of time a hazard was in place is “[o]ne of the most
13 important questions that must be answered in establishing constructive notice.” *Walker v.*
14 *Montgomery Ward & Co.*, 511 P.2d 699, 702 (1973). At trial, the burden would be on
15 Plaintiff to show how long the water had been there. *Id.* at 703. Plaintiff states Defendant
16 is wrong regarding how long the water was on the floor, but she does not offer any evidence
17 of an alternative time. And while Plaintiff argues it is “far from clear” how long the water
18 was on the floor, attorney argument and speculation is no substitute for competent

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20 notice; 2) constructive notice; 3) mode of operation of the property. This case falls into
21 category Nos. 2 & No. 3.” (Doc. 37 at 6).

22 ³ Plaintiff argues there is a dispute of fact regarding “constructive notice” because one of
23 Defendant’s employees “walks by the area where Plaintiff fell.” (Doc. 37 at 6). Plaintiff
24 appears to be referencing the employee who walks down the right-hand aisle. The
25 surveillance video shows that employee was not looking towards the area of the spill. And
26 the fact that an employee was in the general area of a spill is not enough to prove
27 constructive notice; constructive notice depends on the amount of time the water was on
28 the floor, not on whether Defendant’s employees were in the general vicinity of the water.
See Spill notice requirement, 3 Premises Liability 3d § 49:1 (2018 ed.) (“Even though a
store employee is working in the vicinity of a foreign substance, constructive knowledge
cannot be inferred where the employee is facing in another direction.”). Plaintiff also
claims “[a]rguments can be made that another employee of Defendants is standing right in
front of the liquid.” (Doc. 37 at 6). The video does not depict any such employee and
Plaintiff cannot avoid summary judgment based on arguments “utterly discredited by the
record.” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding summary judgment should be
granted where party’s “version of events is so utterly discredited by the record that no
reasonable jury could” believe it).

evidence.⁴ (Doc. 37 at 7). Because Plaintiff does not point to evidence establishing the length of time, her constructive notice theory fails as a matter of law. *Walker*, 511 P.2d at 702 (affirming summary judgment where plaintiff had “absolutely no evidence as to how long the foreign substance was upon defendant’s floor”).

C. Mode-of-Operation

Finally, Plaintiff attempts to avoid summary judgment by invoking the mode-of-operation rule. Plaintiff does not, however, provide any meaningful argument or evidence in support of applying this rule. Therefore, Plaintiff has waived the issue. *See Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259 (9th Cir. 1996) (“Issues raised in a brief that are not supported by argument are deemed abandoned.”).

Assuming Plaintiff had not waived the issue, the mode-of-operation rule requires evidence that 1) the manner Defendant operated its store “regularly” produced dangerous conditions in the area of Plaintiff’s fall and 2) Defendant failed to exercise reasonable care in light of that fact. On the first requirement, Plaintiff points to no evidence addressing how common spills were in the area where Plaintiff slipped. To defeat summary judgment,

⁴ Plaintiff’s opposition might be read as arguing four minutes was sufficient time to create a jury question regarding constructive notice. Plaintiff cites no authority in support of this proposition and available authority shows more than four minutes is necessary to trigger constructive notice. *See Moreno v. Target Corp.*, No. 2:12-CV-01357 JWS, 2013 WL 780989, at *2-3 (D. Ariz. Mar. 1, 2013) (concluding five minutes was insufficient to trigger constructive notice); *Cardoza v. Target Corp.*, No. CV172232MWFRAOX, 2018 WL 3357489, at *3 (C.D. Cal. June 22, 2018) (noting possibility hazard was in place for 10 minutes before a slip-and-fall was insufficient to support finding of constructive notice); *Espinal v. New York City Hous. Auth.*, 626 N.Y.S.2d 790, 791-92 (N.Y. App. Div. 1995) (“The lapse of a five-minute interval between the deposit of a banana peel or other debris and the accident is insufficient, as a matter of law, to establish constructive notice to the defendant of the condition and an opportunity to remedy it.”). Multiple treatises have observed time periods of less than five minutes are not sufficient to trigger constructive notice. *Store or business premises slip-and-fall: modern status of rules requiring showing of notice of proprietor of transitory interior condition allegedly causing plaintiff’s fall*, 85 A.L.R.3d 1000 (Originally published in 1978) (citing courts across the country finding 5 minutes was insufficient to find constructive notice); *Spill notice requirement*, 3 Premises Liability 3d § 49:1 (2018 ed.) (“There must be a substantial interval between the time that the substance appeared on the floor and the time of the accident. Fifteen to 20 minutes has been held to be a sufficient period of time to constitute constructive notice, as has at least 15 minutes, at least 20 minutes, 30 to 40 minutes, or more than an hour. Shorter periods of time have been held insufficient notice of a foreign substance on a store floor, such as fewer than 15 minutes, 10 or 15 minutes, 10 minutes, 5 to 10 minutes, fewer than 10 minutes, 3 to 5 minutes, no more than five minutes, fewer than five minutes, and fewer than two minutes or a few seconds to a minute before the customer’s fall.”).

1 Plaintiff needed evidence at least creating a dispute of fact regarding how “[c]ustomary,
2 usual, or normal” spills were in the area of Plaintiff’s fall. *Borota v. Univ. Med. Ctr.*, 861
3 P.2d 679, 681 (Ariz. Ct. App. 1993). The failure to do so is fatal to invoking the mode-of-
4 operation rule. *Id.* (rejecting mode-of-operation rule where evidence was that spills were
5 infrequent); *Contreras v. Walgreens Drug Store No. 3837*, 149 P.3d 761, 764 (Ariz. Ct.
6 App. 2006) (“The fact that spills occurred twice a week in a store open twenty-four hours
7 a day, without any other evidence about the location of the spills or the hazard they present
8 to customers, is not sufficient for a reasonable jury to conclude that a hazardous condition
9 resulting from those spills would regularly occur.”).

10 Finally, even if Plaintiff had met the first requirement of the mode-of-operation rule,
11 she still needed to point to evidence that Defendant did not exercise reasonable care
12 regarding the regularly occurring spills. It is undisputed Defendant had two employees on
13 duty who were “constantly looking for anything that can cause an incident on the floor.”
14 (Doc. 35 at 2). Those employees were responsible with monitoring the store and
15 remedying any unsafe conditions. Those employees were required to fill out sheets every
16 half-hour indicating they had checked the store for hazards. The employees did so on the
17 day of Plaintiff’s injury, indicating the area of Plaintiff’s fall had been checked at 2:00 p.m.
18 Plaintiff presents no argument or evidence that Defendant acted unreasonably by assigning
19 two full-time employees to check the store and documenting those checks every thirty
20 minutes. While Plaintiff apparently believes Defendant did not exercise reasonable care,
21 the Court “is not required to manufacture arguments” for Plaintiff. *Hiken v. Dep’t of Def.*,
22 836 F.3d 1037, 1046 (9th Cir. 2016). Thus, even if Plaintiff had evidence that spills
23 regularly occurred, she has not established there is a dispute of fact regarding the
24 reasonableness of Defendant’s actions. Absent any argument that Defendant failed to
25 exercise reasonable care, Plaintiff cannot avoid summary judgment based on the mode-of-
26 operation rule.


27 Accordingly,

28 **IT IS ORDERED** the Motion for Summary Judgment (Doc. 34) is **GRANTED**.

1 The Clerk of Court is directed to enter judgment in favor of Defendant and against Plaintiff.

2 Dated this 23rd day of April, 2019.

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Honorable Roslyn O. Silver
Senior United States District Judge